Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	WC Docket No. 03-251

COMMENTS OF FLORIDA DIGITAL NETWORK, INC.

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Summary

Four state commissions have ruled that BellSouth's practice of only providing its DSL-based broadband Internet access services to customers who also purchase BellSouth voice service ("DSL tying") violates state law, and the federal district court in Kentucky has affirmed that state's order. BellSouth's Request for a Declaratory Ruling seeks an order from the Commission preempting these state orders. Notably, BellSouth's Petition makes no serious attempt to defend its DSL tying practice; nor does it try to explain why, as a matter of policy, the Commission should do so. Rather, BellSouth claims that prior Commission orders have *already* preempted the state's DSL tying orders.

In these Comments, FDN demonstrates that the state decisions promote, rather than contravene federal policy and that the grounds BellSouth asserts for preemption are without merit. If BellSouth wants this Commission to preempt the states from barring DSL tying practices, it should submit a proper petition explaining why federal preemption is necessary, appropriate, and legally justified. It has not done so. The Petition must, therefore, be denied.

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I. INTRODUCTION

BellSouth refuses to serve any DSL customer who does not also purchase its circuit-switched voice telephone service, even where its DSL facilities are readily available to the customer's premises.[1] This tying practice makes it impossible for customers who wish to purchase voice services from CLECs, such as FDN, to also obtain DSL service because, due to the pervasive use of digital loop carrier digital ("DLC") in BellSouth's network, CLECs are unable to provide competitive DSL services.[2] Whatever the Commission's belief regarding the

[1] This brief uses the term "DSL telecommunications service" to describe BellSouth's wholesale digital subscriber line ("DSL") - based transport service, sold to ISPs, and used to support its own retail, Internet "information services" product, sold under the brand name "FastAccess."

[2] Tying is an "an agreement by a party to sell one product (the tying product) [here DSL service] but only on the condition that the buyer also purchases a different (or tied) product [here, voice service]." *T. Harris Young & Associates, Inc. v. Marquette*, 931 F.2d 816, 822 (11th Cir. 1991) (quotation omitted, punctuation altered); *see also* 9 Phillip E. Areeda, *Antitrust Law* ¶ 1700a, at 4 (1991). Regardless of whether it violates the antitrust laws, BellSouth's practice of conditioning the availability of FastAccess service on a customer's purchase of its telephone service clearly constitutes a tie. FDN commented on BellSouth's tying policies previously in its *ex parte* letter to the Commission in the Triennial Review Proceeding. *See* Letter from Eric J. Branfman, *et al.*, Counsel for Florida Digital Network, Inc. to Marlene H. Dortch, Secretary,

impairment CLECs face in providing service on DLC loops, the fact remains that BellSouth controls as much as 99% of the DSL market in its region.[3] Thus, nearly all consumers who want DSL must purchase BellSouth DSL, and therefore, BellSouth voice as well.

Now that four state commissions have attempted to protect the right of their citizens to select the service providers of their choice,[4] BellSouth has petitioned this Commission to firmly re-close the doors of competition in these states and beyond. The Petition must be denied. On the merits, the state commissions are right: BellSouth's tying practice is anticompetitive and threatens the development of competition in other discrete markets. Further, BellSouth's Petition lacks any sustained argument for why the Commission *should* preempt the states on this issue and is utterly devoid of any serious attempt to justify the practice on economic, business or policy grounds. Instead, BellSouth blithely asserts that the Commission has *already* preempted the states' DSL tying orders. Specifically, BellSouth offers three arguments:

1. That the *Triennial Review Order's* determination that ILECs are not required by Section 251 to provide DSL on CLEC UNE lines preempts state relief from DSL tying not only under Section 251 but also under any other state or federal law;

2. that States are preempted from regulating information services; and

3. that States are preempted from regulating any telecommunications service that is in some cases interstate in nature.

In these Comments, FDN will briefly demonstrate that the state decisions promote, rather than contravene federal policy. It is also clear that the three grounds BellSouth asserts for preemption are without merit. Therefore, BellSouth's Petition must be denied.

FCC, CC Docket Nos. 96-98, 98-147, 01-318, 01-321, 01-337, 01-338, 02-33 (filed Oct. 21, 2002) ("FDN Oct. 21, 2002 Ex Parte Letter").

[3] FDN Oct. 21, 2002 Ex Parte Letter at 2.

[4] Together, the decisions of the Florida, Georgia, Kentucky and Louisiana commissions are referred to as the "State Orders."

II. THE COMMISSION SHOULD ENDORSE, RATHER THAN PREEMPT, STATE PROHIBITIONS OF DSL TYING

Florida Digital Network, Inc. ("FDN") and its 50,000 Florida and Georgia customers are just a few of the many victims of BellSouth's anticompetitive tying policy. Since 1998, FDN has utilized a UNE-loop strategy to provide telecommunications service, mostly to small-to-medium sized businesses. FDN leases UNE loops from incumbent carriers, utilizes its own Class 5 switches, is collocated in nearly 150 central offices in Florida and Georgia, and operates its own long-haul and local transport network. FDN thus operates as the 1996 Act contemplated competition would evolve. FDN invests in its own facilities and infrastructure where feasible, and leases certain ILEC network elements only where they can not be practically replicated.

Though FDN has built its own facilities and network to the maximum extent possible, like other CLECs operating in BellSouth's service territory, it is unable to provide competitive DSL services to most of its customers. Approximately 90 percent of BellSouth's access lines in Florida and Georgia pass through DLC equipment.[5] As the Commission is aware, the provision of DSL over DLC architecture requires the deployment of DSLAM functionality at the intervening remote terminal. FDN would like to be able to provide DSL to customers served by DLCs, but as it has previously explained in detail to the Commission, it is not economically feasible for FDN to do so at this time or in the foreseeable future. *Id.* at 4-8. FDN is not alone—no CLEC has deployed DSLAM functionality at *any* of BellSouth's 12,000 remote terminals in Florida. As a consequence, BellSouth controls 98-99 percent of the DSL market in Florida, and end-users have no meaningful alternatives to BellSouth DSL where DLC architecture is deployed on a large scale.[6]

FDN first sought relief from BellSouth's DSL tying practices in 2000, when it sought an interconnection arbitration with BellSouth in Florida. FDN's arbitration focused on one issue: its attempt to provide some means of DSL-based Internet access services to its customers. FDN

[5] *See* FDN October 21, 2002 Ex Parte Letter at 3.

[6] Though cable modem service is available to many residential customers, it is not an alternative for the vast majority of businesses who are FDN's main customers. *See id.* at 11-12.

proposed three, non-mutually exclusive types of DSL relief. First, FDN sought unbundled access to the elements of BellSouth's local network necessary for FDN to provide its own DSL services, through a combination of its own facilities and network elements leased from BellSouth. Second, FDN sought the right to resell BellSouth's wholesale DSL telecommunications service. Third, FDN sought an end to BellSouth's DSL tying practice.[7]

The PSC adopted only the third of FDN's proposals, and then only in part. The interconnection agreement language approved by the PSC requires BellSouth to "continue to provide FastAccess to the end-user who obtains voice service from FDN over UNE loops." Notably, the PSC only provided DSL tying relief to end-users who *currently* subscribe to FastAccess. FDN voice customers who want to order new DSL service are still unable to do so, not only from BellSouth but also from any of BellSouth's ISP partners, such as Earthlink or AOL. Therefore, FDN's victory so far has been a limited one, but the Florida PSC Order was an important step forward in vindicating the cause of consumer choice against BellSouth's anticompetitive tying requirement.

Florida was not the only state to recognize the need to limit DSL tying to protect the right of its consumers to choose their preferred service providers. The state commissions in Georgia, Kentucky and Louisiana have taken action against DSL tying, finding, *inter alia*, that "BellSouth's policy of refusing to provide DSL service on CLEC ... lines has a 'chilling effect on competition.'"[8] The Kentucky Commission, for example, found that BellSouth's tying policy "limits the prerogative of Kentucky customers to choose their own telecommunications

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[7] *See* Final Order on Arbitration, *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (June 5, 2002) ("Florida Order") at 3.

[8] *BellSouth Telecomms. Inc. v. Cinergy Communications Co.*, ___ F. Supp. ___ (E.D. Ky. Dec. 29, 2003), 2003 WL 23139419, *7 (quotation in original) (aff'g October 15, 2002 Order, Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252, Case 2001-00432 (Kentucky PSC)).

carriers."[9] The Georgia Commission likewise observed that the tying practice is only explicable as an attempt by BellSouth "to insulate its voice service from the competition that might drive prices down.... The purpose of such a policy can only be so that BellSouth can charge more for the services together than it could apart."[10] In the Florida hearing which led to that commission's order, the Commissioners were openly incredulous upon learning about BellSouth's DSL tying practice:

> Now, as a Commission, we have received mandates from both the federal and our state government to encourage competition. Does it seem like we are correctly following such a mandate if we allow a condition to exist that every time an ALEC customer decides to sign up for DSL service, the ALEC loses the voice customer? It doesn't seem fair to me.

Statement of Commissioner Palecki at 261 (attached). Florida PSC Commissioner Deason likewise recognized that BellSouth's practice of tying together FastAccess and voice services was the predatory conduct of a monopolist seeking to drive its competition out of business:

> [T]here's nothing wrong with making a profit, don't get me wrong. But I guess the question I have is, I'm trying to understand BellSouth's motivation. Would there be more profit in losing a customer altogether or having a partial customer and providing DSL service even though you do not provide voice service? Or is it part of your master marketing plan that you felt like you were going to maximize your revenue by having this requirement because not only would you obtain a DSL customer but you are going to regain a voice customer?

Tr. at 265-66 (attached).

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[9] July 12, 2002 Order, Petition of Cinergy Communications Company for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252, Case 2001-00432 (Kentucky PSC July 12, 2002), 2001 [sic] WL 34013323 at 4.

[10] Order on Complaint, Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996 Docket No. 11901-U (Georgia PSC Oct. 21, 2003) ("Georgia Order").

In fact, BellSouth's "master plan" is to drive out competition in the voice market, where competitors do not and cannot offer DSL to the vast majority of end-users in BellSouth's service territory.[11] As the Georgia Commission concluded:

> The apparent motivation behind BellSouth's policy is to maintain its voice customers by denying them options in a separate market. The customers do not receive a benefit from being denied this option. In fact, they are harmed by being denied the option of receiving BellSouth's DSL service and another provider's voice service. While BellSouth will inevitably lose some DSL customers because of this policy, the only reasonable assumption is that BellSouth believes that it will keep enough voice customers that would have otherwise departed for a preferred CLEC that BellSouth will still come out ahead financially.

Georgia Order at 16.

BellSouth's attempt to protect its incumbent voice service from competition is contrary to the core objective of the 1996 Act. State attempts to eliminate BellSouth's tying policy therefore not only do not negate federal policy – they are compelled by it. The Commission should endorse, rather than preempt, the actions of the state commissions to open local markets to competition.

III. BELLSOUTH HAS NOT SHOWN AN ADEQUATE LEGAL GROUND FOR PREEMPTION

Even were the benefits of the State Orders to local competition less clear, the Commission's ability to preempt state authority is strictly limited. Courts have invalidated overreaching Commission preemption orders that have not demonstrated compellingly "that the

[11] While the Commission need not analyze BellSouth's practice under the antitrust laws in order to deny its Petition, its principles are instructive. That BellSouth's conduct is motivated by anticompetitive objectives is the only explanation for its "willing[ness] to sacrifice short-run benefits and consumer goodwill" in the form of sales of DSL service to FDN voice customers, "in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985). *See also Byars v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir. 1979) (holding that where "a monopolist refuses to deal with customers who deal with its rivals," such behavior is "inherently anticompetitive [and] … is illegal"); *accord Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951).

state regulation negates a valid federal policy" and was preempted "only to the degree necessary to achieve it." *NARUC* at 430-31 (emphasis omitted). For example, in *California v. FCC*, 905 F.2d 1217, 1239 (9^{th} Cir. 1990) (*California I*), the court vacated rules adopted in the FCC's *Computer III* proceeding, which, among other things, ordered the preemption of "nearly all state regulation of the sale of enhanced services by communications common carriers." The court found that this broad preemption order was invalid because the FCC had failed had failed to demonstrate that "state regulation [] would *necessarily* thwart or impede the FCC's goals." *Id.* at 1243 (emphasis in original) (quotation omitted).

On remand, the Commission "acknowledged that 'preemption of state regulation in this area should be as narrow as possible to accommodate differing state views while preserving federal goals.'" *See California v. FCC*, 39 F.3d 919, 932 (9^{th} Cir. 1994) ("*California III*") (quoting *Computer III Remand Proceedings Order*, 6 FCC Rcd. at 7631). Accordingly, the FCC's new preemptive rules were considerably "narrower than the order it issued in *Computer III*." *California III*, 39 F.3d at 932.

The Commission certainly has never encouraged BellSouth to tie its DSL offerings to the provision of voice telephone service or to deny DSL to customers who choose other voice providers. BellSouth does not, because it cannot, point to any such policy pronouncement by this Commission. Accordingly, there can be no preemption of the state orders that curb these BellSouth practices. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (observing that state regulations are "[c]onsistent" with federal law, and thus not preempted, so long as it is "possible to comply with the state law without triggering federal enforcement action").

Far from advancing federal competition policy, BellSouth's tying practice undermines it. In addition, the Commission has itself previously noted that DSL tying could be the subject of a Section 208 complaint as unlawfully discriminatory and unreasonable.[12] Thus, not only has it never been established that DSL tying is favored by federal policy; indeed, it is far from settled

[12] *Line Sharing Reconsideration Order*, 16 FCC Rcd. 2101, ¶ 26 (2001). *See infra* Section III.A.

that it is even permitted by federal law. Accordingly, there is no compelling affirmative basis to preempt the State Orders. BellSouth's Petition could be granted, therefore, only if one of its three supposed mandatory bases for preemption was implicated by the State Orders, but none of these arguments withstands scrutiny.

A. The *Triennial Review Order* Did Not Preempt State Consumer Protection Actions That Do Not Impose New Unbundling Requirements

BellSouth tries very hard in its Petition to mischaracterize the State Orders as imposing a new unbundling requirement on BellSouth under the auspices of Section 251 of the Act. Its purpose is readily transparent—the states' authority to require further unbundling is constrained by the *Triennial Review Order*,[13] and BellSouth now hopes to impose that constraint on the State Orders. BellSouth's argument confuses apples and oranges—or, more precisely, it confuses CLECs and consumers, and confuses Section 251 and consumer protection laws.

The *Triennial Review Order* has many branches but they all stem from the same trunk—the implementation of the requirement in Section 251(c)(3) that ILECs provide unbundled network access to *CLECs*. The state DSL tying orders, in contrast, have nothing to do with Section 251, as they do not require BellSouth to provide any UNEs, *or anything else*, to CLECs. Rather, the states invoked their consumer-protection responsibilities (and not unbundling standards) to order BellSouth not to discriminate *against consumers* in its provisioning of DSL. Under the FDN-BellSouth interconnection agreement, BellSouth maintains an exclusive, direct relationship with its DSL customer, and even has the option of providing its service over a separate, standalone loop. If BellSouth wanted to, it could maintain such a relationship with the end user without FDN ever knowing.

BellSouth's contention that the state tying relief is really an unbundling requirement is based on the superficial similarity to Comptel's request in the Triennial Review for the creation

[13] Report and Order and Order on Remand, and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC No. 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

of a "low frequency portion of the loop" (LFPL) UNE. But BellSouth misses the point. The Commission declined to require a LFPL UNE because it found that, under the standards of Section 251, a "narrowband" voice CLEC was not impaired if it could team with a data CLEC in a line splitting arrangement. In the first place, the Commission's Section 251 analysis has no bearing on whether DSL tying violates anything other than Section 251. Second, the creation of an LFPL UNE would not necessarily deter DSL tying, as BellSouth could provide a low frequency portion of the loop and yet still refuse to provide its FastAccess information service to CLEC voice customers. In other words, Comptel's petition could have been granted but still not have prevented DSL tying. Third, unique to the BellSouth region, the alternative of line splitting is meaningless to a "narrowband" CLEC because there are no data CLEC services available in the vast areas where BellSouth has deployed DLCs.

BellSouth's contention that the State Orders impose an "excessive sharing requirement[]" that "deprives ILECs of the benefits of their investment in DSL deployment," Petition at 14, 2, is also baffling. Where BellSouth uses a standalone loop, it shares nothing with a CLEC at all; and where it uses the high frequency potion of the loop that is shared with a CLEC, the CLEC is paying the full TELRIC price for the loop—which BellSouth would have to offer regardless—and continues to receive a significant portion of the retail revenue from the line. As for deterring investment, BellSouth's contention is equally confounding: BellSouth would be charging exactly the same price for its DSL to CLEC customers as to anyone else. Indeed, the Florida Order permits BellSouth to charge FDN customers *more*.[14] BellSouth, and no one else, receives all the benefit of its DSL investment. The elimination of DSL tying therefore poses no legitimate threat to the Commission's objective of promoting broadband investment.

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[14] *See* Order Resolving Parties' Disputed Language, *Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (Mar. 21, 2003) at 8 ("we believe that there could be circumstances where a [BellSouth] customer is entitled to a discount that need not be made available to a [FDN] customer who subscribes only to FastAccess").

The absurdity of BellSouth's position here is best illustrated by the following analogy: Section 251 does not require BellSouth's trucks to stop at red lights, even to avoid running over CLEC employees. If a CLEC had filed comments in the *Triennial Review* proceeding demanding that UNE rates be adjusted based on the frequency of traffic accidents, the Commission presumably would have had no basis for providing relief under Section 251, and would have denied the request. But BellSouth would not then be able to rely on the *Triennial Review Order* to claim that it would be immune from paying damages to injured pedestrians under state law. Far from preempting state authority, the Commission would likely note that CLECs injured by such practices should seek relief not through Section 251 but through other legal channels.

And this is exactly what the Commission has done with respect to DSL tying. As BellSouth notes, the first time the Commission addressed DSL tying was in the *Line Sharing Reconsideration Order*, where it declined to impose limits on DSL tying under Section 251. *See* Petition at 13. The issue arose when AT&T asked the Commission to "clarify" that the *Line Sharing Order* precluded the kind of ILEC DSL tying at issue here. On procedural grounds, the FCC denied the request, noting that because it had not entertained the issue in its initial rulemaking, it could not take it up on reconsideration. Far from endorsing DSL tying, however, the FCC specifically preserved the right of parties to challenge the practice in the future: "If AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, *we encourage AT&T to pursue enforcement action.*" *Line Sharing Reconsideration Order* ¶ 26 (emphasis added). Thus, the Commission clearly recognized that even if there was no recourse for DSL tying under Section 251, there may well be available relief under other substantive provisions of the Act or state law. While the Commission did not express any opinion as to the outcome of such enforcement action, its acknowledgment of the possibility contrasts sharply with the affirmative approval of BellSouth's practice that would be needed to warrant preemption.

Therefore, the state relief from DSL tying is not an unbundling requirement, and does not prevent the implementation of the *Triennial Review* or its underlying purposes. This basis for preemption must be denied.

B. States Have Not Been Preempted From All Regulation Related To Information Services

1. Information Services are not "Unregulated"

BellSouth's second argument for preemption asserts that states have been stripped of any and all authority to regulate information services, such as BellSouth's retail FastAccess service. But BellSouth's claim that "information services must," as a matter of federal policy, "remain *unregulated,*" Petition at 10 (emphasis in original) is demonstrably false. Information services have been pervasively regulated by the Commission. Indeed, when the Commission first created the distinction between what are now called information services and telecommunications services, it imposed a host of regulatory obligations on carriers' provision of information services. *See Computer II Final Decision*, 77 FCC 2d 384, 433 (1980). That purportedly "deregulatory" order stipulated that carriers such as BellSouth could only offer information services through a separate subsidiary that would provide the underlying telecommunications services on the same terms and conditions to other information service providers. *See id.* 498-99. The Commission subsequently permitted carriers to opt-out of the separate affiliate requirement, but added additional regulatory safeguards to assure that carriers operating bottleneck transport facilities could not anticompetitively restrict third-party enhanced service providers' access. *See California v. FCC*, 905 F.2d 1217, 1228-30 (9th Cir. 1990) ("*California I*") (summarizing the *Computer III* rulemaking proceedings).

And since the *Computer Inquiry* rulemakings, the Commission has, from time to time, imposed other regulatory requirements on information service offerings. For example, the FCC required LECs to make voice mail offerings accessible to the hearing impaired. *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, 16 FCC Rcd 6417, ¶¶ 98-99 (1999). Similarly, in its order approving the AOL-Time Warner merger, the FCC imposed a stringent set of structural and operational regulations on AOL's offering of Instant Messaging ("IM") service, which it classified as an information service. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, ¶¶ 128-33 (2001). The FCC also required AOL-Time Warner to provide unaffiliated ISPs access to its cable system on equal and nondiscriminatory terms. *Id.* ¶¶ 126-127.

The states clearly regulate information services, as well. For example, dozens of states have laws regulating e-mail (often commercial spamming) in one way or another.[15] Congress recently adopted a federal anti-spam law that preempts some aspects of state spam regulation; but, had states already been preempted from all regulation of e-mail, that provision of the law would have been unnecessary.[16] Other states have enacted privacy laws that directly regulate the manner in which Internet Service Providers handle and maintain confidential information. *See, e.g.,* 2002 Minn. Sess. Law, Ch. 395, art 1, §§ 1-11, *codified at* MN St. §325M.01-11. And Congress has repeatedly recognized that states are free to tax Internet access and other services absent a federal prohibition, which recently expired. Thus, as an empirical matter, BellSouth's claim that information services are "unregulated" is demonstrably false.

2. The Commission Has Explicitly Recognized that States Have Not Been Wholly Preempted with Respect to Information Services

The Commission itself has recently recognized that its existing preemption of information service regulation is not unlimited in scope. In the *Cable Modem Ruling* (¶ 33), the Commission determined that the high-speed Internet access service provided by cable television providers is an information service. In the *Wireline Broadband NPRM* (¶ 13), the Commission tentatively reached the same conclusion with respect to DSL service. However, in both orders, the Commission recognized that the information service regulatory classification carries with it

[15] *See* http://www.spamlaws.com/state/index.html (summarizing state laws) (viewed January 29, 2004).

[16] *See* P.L. 108-187 (Spam Reduction Act).

no automatic preemptive consequences. *E.g., Cable Modem Ruling* ¶ 96. Accordingly, the Commission sought comment on "*whether* we should use our preemption authority to preempt specific state laws or local regulations." *Id.* ¶ 99 (emphasis added). Thus, the FCC explicitly recognized that states were not already preempted per se from regulation of information services.

3. The State Orders Do Not Constitute Impermissible State Regulation of Information Services

While it is therefore clear that states have not been wholly preempted from regulation information services, is it also clear that the Commission has preempted some forms of state regulation over such services in its *Computer Inquiry* proceedings. The next step in evaluating BellSouth's Petition is to determine the scope of what has been preempted.

On this question, the Commission's own orders and regulations answer clearly. States are preempted from imposing structural separation requirements on a carrier's information service offerings. S*ee California v. FCC*, 39 F.3d 919, 931-933 (9th Cir. 1994) ("*California III*"). And, information services are not to be subject to common carrier regulation. 47 C.F.R. § 64.702(a); *see also Vonage Holdings Corp. v. Minnesota PUC*, 290 F.Supp.2d 993 (D. Minn. 2003). State decisions that impose structural separation or common carrier requirements on information services are therefore likely preempted.

The two cases that BellSouth cites for the proposition that state commission attempts to regulate information services are *per se* preempted, *see* Petition at 21-22, both involve these areas in which the Commission has spoken clearly about when state regulation is preempted. Moreover, the Commission's order in the *Memory Call* case had nothing to do with the fact that the voice mail product at issue in the case was an information service.

In *Memory Call*, the Georgia PSC announced that it would impose a vast regulatory scheme on BellSouth's voice mail offering, including "(1) tariffing and rate regulation of enhanced services; (2) comparably efficient interconnection (CEI) requirements; (3) Customer Proprietary Network Information (CPNI) rules; and (4) marketing restrictions, possibly including an entirely separate organization for marketing BellSouth's voice mail service."[17] Even more severe was Georgia's decision to bar BellSouth from offering voice mail to any new customers until the Commission established its rules. *Id.* The issue in the case was whether BellSouth's voice mail offering contained sufficient interstate characteristics to allow the Commission to assert jurisdiction. Once the FCC determined that the service was partly interstate, there was little question that if nothing else Georgia's outright prohibition on offering service to new customers impeded federal policy and the public interest that BellSouth be allowed to offer voice mail to its customers. But even despite these factors weighing in favor of preemption, the FCC found itself "generally reluctant to preempt state authority" over jurisdictionally mixed services.

Vonage offered a similarly easy case. The Minnesota Commission had attempted to apply the entirety of its local exchange common carrier regulation to Vonage's voice-over-IP information services. Vonage would have been made subject to licensing, tariffing, and all other common carrier regulation that Minnesota applies to telecommunications common carriers. Once it was established by the court that voice-over-IP is an information service, it was clear that the Minnesota regulation contravened the federal determination that information services were not to be subject to common carrier regulation.

In prohibiting DSL tying, the states have not, however, imposed "traditional public utility regulation o[n] enhanced services," Computer II, 77 FCC 2d at ¶ 7, or a "common carrier scheme of regulation ...," id., ¶ 123. Instead, the states have exercised their authority under state and federal law to promote competition and consumer choice in the state. *See generally* Fla. Stat. Ann. § 364. While the states have directed BellSouth not to discriminate against certain classes of customer, they cannot be said to have imposed anything approaching the vast regulatory scheme found in Title II: the obligation to offer service to any person upon demand (§ 201(a)); regulatory supervision to ensure that rates and terms of services are just and reasonable (§§ 201(b), 205) and nondiscriminatory (§ 202); the obligation to make public offers for service via

[17] Petition for Emergency Relief and Declaratory Ruling filed by the Bellsouth Corporation, 7 FCC Rcd. 1619, ¶ 2 (1992) ("*Memory Call Order*").

tariffs (§ 203); regulation relating to ownership (§ 212), management (§ 218), and construction and extension of facilities (§ 214); the filing of annual and other reports (§ 219); the application of certain accounting and depreciation rules (§ 220); and safeguards that regulate a common carrier's ability to use private customer information and confidential information related to other carriers that are obtained in the course of providing common carrier services (§ 224). While the extent of common carrier regulation has varied over the years, at no time since the Act has it been anything other than a pervasive regulatory scheme that substantially affects nearly every aspect of a common carrier's business and operations. It was this pervasive regulatory scheme that the FCC's *Computer Inquiry* cases held should not be applied by states to enhanced (*i.e.*, information) services.

BellSouth argues that the state commissions have imposed common-carrier regulation by ordering BellSouth not to disconnect or impose additional surcharges on an existing DSL customer simply because the customer switches to an unaffiliated voice provider. On the contrary, this simple, limited restriction bears, at most, only a slight resemblance to just one of the many requirements of Title II – the obligation to serve all comers. Yet in the case of the Florida Order, even this most basic of common carrier regulations was not imposed. The Florida order does not require BellSouth to serve all customers; BellSouth may still refuse service to many people, including all of FDN's existing voice customers. Thus, BellSouth's FastAccess does not, by BellSouth's own definition, include the essential characteristic of a common carrier service, and the PSC has not forced it to adopt that essential characteristic of serving all people indifferently. The State Orders, therefore, cannot be characterized as imposing common carrier regulation.

Finally, it cannot seriously be suggested that states are preempted from adopting any regulation that bears any resemblance, no matter how slight, to any single common carrier obligation. Such a theory would lead to absurd results. For example, while Title II requires common carriers to file "annual and other reports," states are not preempted from requiring an information services company to comply with state corporation laws and file basic corporate information. While Title II requires common carriers to offer service on nondiscriminatory terms to anyone who requests service, states are not preempted from enforcing civil rights laws that prevent information services providers from refusing service to minority communities. These are simply a few of the many areas of regulation that remain open to states. All that is prohibited is regulation that substantially prevents the effectuation of federal policy that information services remain free from pervasive common carrier regulation. This the State Orders do not do.

Where this Commission has regulated information services, such as the *Computer Inquiry* unbundling requirements, it has done so to promote competition and consumer choice. The state DSL tying orders promote this same objective. Because states have not been wholly preempted from regulation of information services, and because the tying relief advances federal policy, BellSouth's second basis for preemption fails.

C. The States Are Not Wholly Preempted From Regulating Mixed Intrastate/ Interstate Services

1. States May Regulate Jurisdictionally Mixed Services So Long as Federal Policy is not Negated

BellSouth's final preemption argument rests on the claim that the Communications Act has entirely preempted state authority over jurisdictionally mixed intra/inter-state services. This claim has been repeatedly rejected by federal courts, including the Supreme Court and also the Kentucky district court that upheld the Kentucky's Commissions DSL tying regulations.

Though the 1934 Act empowers the Commission to regulate interstate communications (§ 1), it also expressly preserves state authority to regulate intrastate communications (§ 2(b)). With respect to DSL tying, the Kentucky federal district court flatly rejected BellSouth's argument, explaining that, "The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service 'neatly into two hemispheres,' one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction." *Cinergy*, 2003 WL 23139419, *5 *(quoting*

Louisiana PSC v. FCC, 476 U.S. 355, 360 (1986)). In *Louisiana*, the Supreme Court made plain that these are not mutually exclusive grants of regulatory authority: "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities." *Louisiana*, 476 U.S. at 360. Accordingly, *Louisiana* and its progeny make clear that that there is no general field preemption simply because a service supports both intrastate and interstate communications. "[S]ince most aspects of the communications field have overlapping interstate and intrastate components, these two sections [§§ 1 and 2(b)] do not create a simple division [of authority] …." *Public Util. Comm'n v. FCC*, 886 F.2d 1325, 1329 (D.C. Cir. 1989).

Jurisdictionally mixed services are therefore subject to dual regulation, and to preempt state regulation, the Commission bears a heavy burden and must narrowly confine that preemption to directly conflicting state regulation that "negates" federal regulation or policy. A state's regulatory authority is only limited "when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) ("NARUC"). State action is therefore not limited to precision mirroring of federal regulation; instead, states are free to act so long as they do not prevent the realization of federal objectives. Thus, the Kentucky court found that states are not preempted from regulating DSL tying because BellSouth failed to establish that such regulations "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." *Cinergy* at *15.

Thus, BellSouth is flatly wrong to suggest that state regulation is preempted because the service contains interstate characteristics, and is further wrong that the *GTE Tariff Order*, 13 FCC Rcd. 22466 (1998). That decision expressly noted that DSL carries intrastate communications. As in the *Memory Call Order,* upon which the *GTE Tariff Order* relies, the question was whether they also carried sufficient interstate communications to qualify as a federal service subject to federal tariffing. In ruling that they did, the FCC simply invoked its "mixed-use facilities rule" that justifies federal regulation where "more than ten percent of the traffic is interstate." *Id.* ¶ 23. The FCC further ruled that federal tariffing is not inconsistent with the recognition that DSL services carry substantial intrastate communications. *Id.* ¶ 23. Indeed, RBOCs like BellSouth have acknowledged that "communications through the Internet using []DSL service may be intrastate, interstate, or international." *Bell Atlantic Tel. Cos.*, 13 FCC Rcd. 23667, ¶ 11 (1998). Most importantly, the FCC *expressly declined* to reach the broader issue of whether other state regulation was preempted. *Id.* ¶ 28.

Thus, contrary to BellSouth's characterization, the *GTE Tariffing Order* does not stand for the proposition that the mere presence of interstate characteristics excludes the possibility of state regulation. Rather, it only means that when sufficient interstate characteristics are present (10%), then the Commission *may* authorize services to be tariffed at the federal level (which effectively preempts contrary state regulation).[18] Therefore, state regulation of wholesale DSL is not preempted per se; it need only avoid conflict with federal policy and the carriers' federal tariffs. *See Diamond International Corp. v. FCC*, 627 F.2d 489, 492-95 (DC Cir. 1980) (Commission may refrain from exercising jurisdiction over interstate services, thus permitting state regulation of jurisdictionally "mixed" services); *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (DC Cir 1980) (where "Congress ha[s] given an agency power to regulate in a certain area, but the agency ha[s] not yet regulated in that area," state regulation is permissible so long as Congress or the agency has not already preempted the field).

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[18] As explained below, the State Orders are not inconsistent with BellSouth's FCC Tariff. The presence of interstate characteristics has no automatic preemptive consequences. Thus, BellSouth's citations (*e.g.*, Petition at 28 n.31) to cases such as *Qwest Corp. v. Scott*, No. 02-3563, 2003 WL 79054 (D. Minn. Jan. 8, 2003), and *Illinois Bell Tel. v. Globalcom, Inc.*, No. 03 C 0127, 2003 WL 21031964 (N.D. Ill. May 6, 2003), are inapposite. The question is not whether interstate telecommunications services can be tariffed; they can be. And while the authorization of federal tariffing authority may, pursuant to the filed tariff doctrine, lead to displacement of state regulation that is clearly contrary to the tariff itself (as is the situation in the cases BellSouth cites), the PSC's order is fully consistent with BellSouth's tariff and thus not preempted.

2. There is No Conflict Between the State Orders and BellSouth's FCC Tariff

As an alternative argument, BellSouth suggests that the State Orders must be preempted because they are inconsistent with its interstate wholesale DSL tariff. *See* Petition at 27-29. This tariff offers wholesale DSL to an "end-user premises" that is serviced by an "existing, in-service, Telephone Company provided exchange line facility." *See* BellSouth F.C.C. No. 1, § 7.2.17(A). BellSouth claims that when a CLEC provides voice service to a customer using an unbundled loop, the CLEC, *not* the incumbent carrier, controls that facility and has the exclusive right to use it, so that the loop loses its status as a BellSouth "provided" facility.

BellSouth's argument is flawed for at least four reasons. First, at least in Florida, BellSouth may comply with the PSC order without using an FDN UNE loop. The interconnection agreement specifically authorizes BellSouth to provide its DSL service over a loop separate from the UNE loop leased by FDN. Indeed, BellSouth specifically requested this option so that, in its view, the relief would be consistent with its FCC tariff. Thus, when BellSouth complies with the order by using a second loop, which BellSouth has indicated is its preferred approach, BellSouth's tariff-conflict argument is inapplicable.

Second, nothing in the tariff is obviously incompatible with the PSC Order. The tariff states only that BellSouth will offer its DSL-based telecommunications transport service over its own existing, active facilities. BellSouth concedes that all a CLEC secures when it leases UNE loops is use of that facility for the relevant time. BellSouth retains ownership of the line, including obligations to maintain and repair it and the ability to account for it as an asset (and depreciate it in the income statement). Moreover, the tariff defines an "in-service exchange line facility" as "the serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device (NID)." This definition, which closely tracks the FCC definition of a UNE loop (*see* 47 C.F.R. § 51.319(a)(1)), does *not* indicate that a "Telephone Company provided exchange line facility" includes, *sub silentio*, the requirement that BellSouth be the retail voice provider when providing wholesale DSL transport service. Nor does the tariff stipulate that "line equipment" that satisfies BellSouth's definition of an "exchange line facility" no longer qualifies as such under the tariff when BellSouth leases UNE loops to FDN. It is well established that ambiguous tariff terms are to be interpreted *against* the drafter.[19] Thus, the Commission must give the tariff its most natural reading—a loop leased to a CLEC as a UNE remains a BellSouth-"provided exchange line facility" over which BellSouth's tariff authorizes BellSouth to provide DSL-based information services.

Third, the tariff requirement, if it is a requirement at all,[20] demands only the use of BellSouth *facilities*, not the end-users' subscription to BellSouth retail *services*. BellSouth's wholesale tariff does not refer even once to BellSouth's retail offering.

Fourth, and finally, even if the argument that BellSouth advances here is, in fact, what it intended when it drafted and filed the tariff, and not the creation of its lawyers for purposes of this and other DSL tying proceedings, that subjective intent is entitled to little or no deference here.[21] Rather, the opposite is true. The FCC has consistently found that "tariffs are to be

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[19] *See Norfolk & W. Ry. v. B. I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir. 1980) ("'tariff[s] should be construed strictly against the carrier since the carrier drafted the tariff'"); *Bell Atl.-Del. Corp. v. Global Naps, Inc.*, 15 FCC Rcd. 5997, ¶ 22 (2000) ("ambiguous tariff provisions must be construed against the drafting carrier"); *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomms. Corp.*, 13 FCC Rcd. 22568, ¶ 13 (1998); *Associated Press*, 72 FCC.2d 760, ¶ 11 (1979); *Commodity News Servs., Inc. v. Western Union Tel. Co.*, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960).

[20] The tariff provision is not sufficiently clear to suggest that all other varieties of the service are prohibited. The description states that the service "contemplates" an overlay configuration of facilities "such as" the ones described. Nothing in the tariff prohibits BellSouth from offering a configuration other than that which has been "contemplated", especially when it would utilize facilities similar to those described in the tariff. In any case, DSL service can be provided on FDN's UNE lines in a manner consistent even with the "contemplated" example set forth in the tariff, using the same facilities as are used to provide DSL service on a BellSouth retail line or a reseller line.

[21] That BellSouth provides its DSL service to CLECs who resell BellSouth voice service suggests that the argument is a concoction. On these resold lines, BellSouth continues to provide DSL service to CLEC voice customers, even though they have switched to a different retail voice carrier. For the purpose of evaluating the applicability of the DSL tariff provision, the record does not reflect any material differences in provisioning DSL over these resale lines compared to UNE loops, and, indeed, none exist. If a resale line is a BellSouth-provided exchange line facility, so too is a UNE loop.

interpreted according to the reasonable construction of their language and neither the intent of the framers nor the practice of the carrier controls. Thus, tariffs must be able to stand on their own, without further interpretation from the carrier." *The Associated Press, Request for Declaratory Ruling*, 72 FCC Rcd. 760, ¶ 11 (1979). Ambiguous tariff provisions are to "be construed against the framer and favorably to users," and the carrier's stated "intent in promulgating [the tariff provision] is irrelevant." *Id.*

If BellSouth truly wants to write its tying practice into its tariff (and subject it to challenge under 47 U.S.C. §§ 204-205) – and thus have facilities "provided" by BellSouth exclude BellSouth's facilities that serve CLECs' telephony customers – then BellSouth must propose revisions to its tariff that express clearly this anticompetitive outcome. If and when it does so, the public would have the opportunity to challenge BellSouth's proposed revisions. In the meantime, however, BellSouth cannot wield the tariff as a tool to block the lawful regulations of the state commissions that have banned DSL tying.

3. The 1996 Act Expressly Authorizes State Measures to Promote Telephony Competition.

In addition to their general concurrent authority over jurisdictionally mixed services, the states have undisputed authority to foster competition in the local telephony markets. In this case, the state commissions were not only regulating a service that carried intrastate communications, but were doing so to ensure that BellSouth's tying of DSL to its telephony service did not hinder BellSouth telephony customers from switching telephony providers. Federal law sets a floor, not a ceiling, on such state regulation. Subject to §§ 251-252, the state commissions have clear authority over local telephony and the conditions limiting competition in the service, *see* 47 U.S.C. § 152(b), and §§ 251-252 do not divest them of that authority – and in fact expressly preserve it – except where an order clearly conflicts with the federal statute or implementing regulations. *See* 47 U.S.C. §§ 251(d)(3) ("Preservation of State access regulations"); *id.* § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement"); *id.* § 261(b) (preservation of state regulatory powers to fulfill requirements of local competition requirements); *id.* § 261(c) (no preclusion of state regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part"). BellSouth can point to no such inconsistency.

Congress also provided in § 601(c) that amendments made by the 1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly so provided* in such Act or amendments." 1996 Act, § 601(c), 110 Stat. at 143 (uncodified note to 47 U.S.C. § 152) (emphasis added). This provision alone precludes preemption, because the 1996 Act does not "expressly ... provide" that BellSouth may deny FastAccess to competitors' UNE voice customers and the State Orders are not otherwise inconsistent with federal law. The 1996 Act, as § 601(c) declares, did not "modify, impair or supersede" the authority of state commissions to adopt pro-competitive regulations consistent with the Act's purposes. 1996 Act, § 601(c), 110 Stat. at 143; *see also* 47 U.S.C. §§ 251(d)(3), 261(b) & (c), and 252(e)(3). Thus, the states' authority should be presumed. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent").[22]

Instead of acknowledging the 1996 Act's preservation of pro-competitive state law regimes, BellSouth's argument proceeds from the false assumption that state-imposed requirements are prohibited unless they are *required* by the Act. But BellSouth incorrectly equates the absence of a federal *requirement* in the Act with a federal *prohibition*. State commissions are free under the Act to impose state law requirements on incumbents in addition

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[22] Congress is perfectly capable of drafting statutory language that requires state law to exactly mirror federal law when that is its intent. *See, e.g.*, Medical Device Amendment Act, 21 U.S.C. § 360k(a)(1) ("no State ... may establish or continue in effect ... any requirement... which is different from, or in addition to, any requirement applicable under this chapter"); Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (preempting state "law or regulation ... that is not identical to a regulation prescribed under section 4302 of this title").

to those mandated by federal law. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b) & (c); *AT&T Communications v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 642 (5th Cir. 2001); *MCI Telecomms. Corp. v. US West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000). That is precisely what the state commissions have done here.

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's Petition.

Respectfully submitted,

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Dated: January 30, 2004

ATTACHMENT

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010098-TP

In the Matter of

PETITION BY FLORIDA DIGITAL NETWORK, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED INTERCONNECTION AND RESALE AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. UNDER THE TELECOMMUNICATIONS ACT OF 1996.
_______________________________________/

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VOLUME 2

Pages 170 through 274

PROCEEDINGS: HEARING

BEFORE: COMMISSIONER J. TERRY DEASON
COMMISSIONER LILA A. JABER
COMMISSIONER MICHAEL A. PALECKI

DATE: Wednesday, August 15, 2001

TIME: Commenced at 9:35 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: TRICIA DeMARTE
Official FPSC Reporter
(850) 413-6736

APPEARANCES: (As heretofore noted.)

here? If one of the ALECs, for example, an ALEC that only had a few end use customers at the end of your remote terminal wanted to share in the cost of the DSLAM, would that be something that you might entertain?

THE WITNESS: Again, you know, I don't have the authority to make those decisions, but it might possibly be something we could consider. We don't think it is required or necessary, but it might be possibly something we could consider at some sort of market rates.

COMMISSIONER PALECKI: Now, as a Commission, we have received mandates from both the federal and our state government to encourage competition. Does it seem like we are correctly following such a mandate if we allow a condition to exist that every time an ALEC customer decides to sign up for DSL service, the ALEC loses the voice customer? It doesn't seem fair to me, and that's the reason I'm asking you the question.

THE WITNESS: I agree, and I understood your question, and I understand your comment. I think isolated incidents, those things may happen, but there is considerable competition in the marketplace when you look at cable alone. There are opportunities for customers to have high-speed advanced services through cable. They are coming on-line with the DSS satellite where you can have high-speed Internet access. There are other direct broadcast. I forget the name of them. I think it's wide area multiplexing. Technologies that are on the horizon. I think the refrain that needs to be considered here by this Commission and one that the FCC cautioned in its order, it said, this is a burgeoning market. Before we start to hem it in with regulations, we want to think about what's the impact going to be on the marketplace. And that's why they refrained from doing packet. They said, there's packet out there.

And as we were just discussing a while ago, there is much more cable that's providing the same type of service, actually faster than DSL, on cable. And so to go into players in the marketplace and to begin to put regulations on them that may cause reevaluations of business plans, I'm not sure that's going to further competition.

COMMISSIONER PALECKI: So you could tell FDN to team up with a cable company when they receive inquiries for customers that want DSL, try to sell them cable broadband, and that way they could keep their voice telephone customers?

THE WITNESS: I would encourage FDN and any ALEC to consider any and all possibilities.

COMMISSIONER PALECKI: Thank you.

COMMISSIONER DEASON: I have just a question or two. Back to Exhibit Number 8. I believe you have that in front of you.

THE WITNESS: Yes, sir.

COMMISSIONER DEASON: The end use customer, I want you to assume, is an FDN customer subscribing to voice and maybe some ancillary services, but they don't have any DSL service. And this customer calls up BellSouth and inquires as to whether they can obtain DSL service. And I would assume that they would be told that they are not capable of having DSL service because they are receiving voice service from a different carrier; is that true?

THE WITNESS: Well, I think a number of things would happen. First, we don't know if BellSouth can actually offer DSL in this area or not. We don't know in this DSLAM if this customer is within the requirements. And then, secondly, since it's an FDN customer, they're not going to appear in any BellSouth database. So the BellSouth rep most likely would not be able to say yea or nay, and they would have to identify them with another carrier. And then at that point they would be told that they couldn't have -- or should be told that they could not have BellSouth Fast Access.

COMMISSIONER DEASON: Okay. They would be told that they cannot because BellSouth cannot verify whether they are DSL capable or because they're a subscriber to a different telephone company?

THE WITNESS: Well, both. We wouldn't find them, and then we would have to find out -- either the customer would have to say, well, I'm actually being provided service by another carrier, and we can't provide that service over another carrier's.

COMMISSIONER DEASON: Okay. Now, would BellSouth say to that customer, but if you switch to BellSouth, we can -- assuming that it is indeed capable, would the representative have that knowledge, and would that representative tell the potential customer that?

THE WITNESS: I don't know if they would have that knowledge to tell the customer that or not. I haven't seen any marketing scripts that would ever suggest that they do that, but I don't know that they're out there or not.

COMMISSIONER DEASON: Okay. I'm putting my place -- I'm putting myself in the place of the end use customer for a moment. And I'm receiving my local service from FDN, and I want to obtain high-speed Internet access. I call BellSouth because I see this advertisement. And I call the 1-877 number, and I indicate that I want high-speed Internet access. The customer representative would probably ask for my telephone number?

THE WITNESS: Yes. I mean, that's the way we identify in our database whether or not it's even available to your area.

COMMISSIONER DEASON: Okay. So when I give that telephone number then, the customer representative is going to say, you are not in our database, and maybe ask, who do you receive service from, and then the customer representative then determines that I'm not a voice customer of BellSouth.

THE WITNESS: Okay.

COMMISSIONER DEASON: Am I told at that point that, sorry, there is nothing I can do, good day, and hang up or --

THE WITNESS: As I said earlier, I don't know if any additional marketing of BellSouth's service -- in other words, like you said, to convince the customer to go to BellSouth would occur. I would think most likely we would encourage the customer to contact their voice provider.

COMMISSIONER DEASON: Okay. Now, obviously, you would agree that BellSouth is in the telecommunications business to make money, wouldn't you?

THE WITNESS: Yes, sir.

COMMISSIONER DEASON: Okay. In fact, I would assume -- you probably have stock in the company and want the company to make money, wouldn't you?

THE WITNESS: Yes, sir.

COMMISSIONER DEASON: Okay. And there's nothing wrong with making a profit, don't get me wrong. But I guess the question I have is, I'm trying to understand BellSouth's motivation. Would there be more profit in losing a customer altogether or having a partial customer and providing DSL service even though you do not provide voice service? Or is it part of your master marketing plan that you felt like you were going to maximize your revenue by having this requirement because not only would you obtain a DSL customer but you are going to regain a voice customer?

THE WITNESS: I think what BellSouth does, it looks at a lot of inputs into making its business model. Besides the marketplace, the available market, you know you are going to lose some customers, and you're going to get some customers, but you also look at what are the costs to provide service to that customer, what are the operational costs. Mr. Williams can speak some to what the operational impediments can be when the customer belongs to another carrier and has their voice service to that, and they can be very onerous. And then the question --

COMMISSIONER DEASON: Okay. Operational impediments.

THE WITNESS: There are those.

COMMISSIONER DEASON: And Mr. Williams can address those?

THE WITNESS: He will address some of those.

COMMISSIONER DEASON: Okay. So you're saying because of those operational impediments, and usually there are costs associated with operational impediments, that it may not be in your best interest to maximize profits by having a quote, unquote partial customer, i.e., one that you provide DSL service to but not voice service.

THE WITNESS: I think it could be one of many inputs